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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1879

JACK HUMPHREY,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Jack Humphrey, respectfully shows:

OPINION BELOW

The opinion below was rendered by the Supreme Court of Georgia under the style of *Humphrey* v. *The State*, No. 28182, and entered on March 8, 1974. A copy of this opinion is appended hereto as Appendix "A." This opinion has not been officially reported at the present time.

STATEMENT OF JURISDICTION

The decree was entered in this case by the Supreme Court of Georgia on March 8, 1974. A petition for rehearing was denied by that Court in an Order entered on March 21, 1974, a copy of which is attached hereto as Appendix "B." Also on March 21, 1974, Petitioner's Motion to Stay Execution of Judgment and Remittitur was granted by that Court to allow the filing of this petition, a copy of such order being attached hereto as Appendix "C." Within ninety (90) days after entry of the Order on the petition for rehearing, this petition for certiorari was filed in accordance with the time requirement specified in Rule 22(1) of this Court.

Jurisdiction of this Court to review the decree in question is conferred by 28 U.S.C. §1257(3) in that said decree was rendered by the highest court of the State of Georgia and involves a right claimed under the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

Whether the entry, search and seizure which took place inside the Petitioner's place of business was in violation of the United States Constitution, Amendments IV and XIV, in that the officers were not in possession of a search warrant and since there was no valid arrest of the Petitioner to support an incidental search?

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment IV, provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A Grand Jury in Houston County, Georgia, returned two indictments against the Petitioner, Jack Humphrey, charging him with violation of the following state criminal laws: the offense of bribery, the offense of carrying a concealed weapon, and the offense of carrying a pistol without a license (R. 52-54). Following a hearing on Petitioner's Motion to Suppress Evidence, which in paragraph 8 asserted his federal right against unlawful search and seizure as follows:

> "That the above-described search of said defendant and his business premises was without the benefit of a search warrant, probable cause or any other basis to justify said search and was accordingly in violation of the laws and Constitution of Georgia and the Fourth and Fourteenth Amendments to the Constitution of the United States of America." (R. 57),

this motion was overruled in all particulars by decree of the Superior Court dated April 2, 1973 (R. 102). This decree was asserted as error in Petitioner's Enumeration

of Errors, paragraph 1 (R. 37) and his Notice of Appeal, paragraph 1 (R. 50) which were filed with the Court of Appeals of Georgia. That Court denied jurisdiction and transferred it to the Supreme Court of Georgia on June 22, 1973 (R. 48).

The Supreme Court of Georgia failed to discuss the federal Constitutional question raised by the Petitioner in its opinion affirming the decrees entered below (See Pages A4-A6 of Appendix "A").

In his Motion for Rehearing, Petitioner raises the refusal to rule in paragraph 2 as follows:

> "The Court grounds its holding on a conclusion that Georgia law authorizes the arrest, search and seizure, completely failing to pass upon the federal Constitutional question which is also part of Appellant's Motion to Suppress." (R. 31).

Also in paragraph 6 of that motion the Petitioner states that:

> "Such a conveniently postponed arrest clearly circumvents the spirit and meaning of the Fourth Amendment as applied to the States through the Fourteenth Amendment to the Constitution of the United States. See *Chimel* v. *California*, 395 U.S. 752 (1969) and particularly at Page 696." (R. 33).

This motion was denied without discussion of the issues raised by Petitioner (R. 36, See Appendix "B").

The existence of Constitutional issues was also raised by Petitioner in his Motion to Stay Execution of Judgment and Remittitur in paragraph 1 as follows:

> "That in the event appellant's motion for rehearing in the above-captioned case is denied, the Court

> stay the execution of judgment and withhold transmission of the remittitur for a period of ninety (90) days from the date of the denial of the motion for rehearing to allow appellant to file with the Supreme Court of the United States a petition for writ of certiorari in this case in order to seek review of the Constitutional issues involved." (R. 1).

The above motion was granted by the Supreme Court of Georgia (R. 4, See Appendix "C").

Thus, the federal Constitutional question asserted in this petition has been raised and ruled on adversely at all levels of the proceedings in this case.

STATEMENT OF FACTS

Inasmuch as the issue raised in this petition is an outgrowth of the trial court's overruling Petitioner's motions to suppress evidence, and the subsequent affirmance of those decrees by the Supreme Court of Georgia, a summary of certain material facts is necessary in order to allow this Court to determine the legality of the decrees entered below. In this connection, an evidentiary hearing was held on the motions to suppress evidence; and the transcript of that hearing is included in the record (R. 110-354).

The evidence showed that on Tuesday, January 9, 1973, Steve Morgan, a councilman of the City of Warner Robins, Georgia, as was Petitioner, met with the Mayor of that City (R. 120) and reported that Petitioner had the previous day made statements to him clearly indicating Petitioner's desire to arrange a payoff for his note on a water and sewer expansion proposal (R. 116, 117-118, 119). The Mayor indicated to Morgan that he was

not the first person to be approached in this regard by the Petitioner (R. 120), and that he (the Mayor) had decided to "call the G.B.I." (R. 121).

The following day, Wednesday, January 10, Morgan met in the Mayor's office (R. 123) with the Mayor and two G.B.I. agents and told them of the Petitioner's statements on Monday, as well as his further statements at a council meeting on Tuesday night (R. 122-123, 125). They told Morgan to go back to his office and call the Petitioner and get him to come up to Morgan's office (R. 125). Morgan placed this call, and around 7:00 p.m. on Wednesday the Petitioner appeared at Morgan's place of business (R. 126-127). At that time the two G.B.I. agents were inside Morgan's office and had placed a tape recorder in a paper bag and laid it on a little bookshelf (R. 128). The recorder was turned on by the G.B.I. man (R. 128-129). The recorder belonged to the G.B.I. men (R. 129). Morgan testified that during this conversation the amount of $25,000.00 was brought up (R. 129-130).

After this conversation at Morgan's office, the Petitioner stated that he would call him later that night (R. 131).

At this point, the G.B.I. agents told Steve Morgan "to call the Sheriff and tell him to meet us at the City Hall *and to bring a deputy with arresting powers.*" (R. 131). Morgan did this and told the Sheriff "to meet me at the City Hall *and bring a deputy with arresting powers.*" (R. 131). This was somewhere around 7:30 p.m. (R. 132).

A meeting had taken place earlier in the day between the investigating agents, Mr. McGlamry, the Mayor and a Mr. Whiting, at which time they had all agreed to go along "with the deal." (R. 133).

Following the recording of the conversation, Mr. Morgan went to the office of Charlie McGlamry, the developer of the project in question (R. 133). The purpose of this visit was to see if McGlamry could get up the money to offer to the Petitioner (R. 133-134).

After the amount had been agreed upon between Morgan and McGlamry, Morgan left McGlamry's office and met with the agents and "their attorney" at the City Hall (R. 135). After some discussion, Morgan returned to his office; and the agents went to Mr. McGlamry's office (R. 135). The individuals going to Mr. McGlamry's office were Agent Wynn, Agent Hutto, the Sheriff, Chief Investigator Talton, Sgt. Snellgrove and Cpl. Joiner (R. 196). The transfer of the money was supposed to take place in Mr. McGlamry's office (R. 197).

Mr. McGlamry remained in his office, and the other individuals placed themselves in an adjoining office (R. 197).

The Petitioner arrived but never came into Mr. McGlamry's office (R. 197). At this point Mr. McGlamry left his office and after about twenty or thirty minutes reappeared, opened the door and stated that "he won't accept the payoff here" (R. 198). Mr. McGlamry further advised that the payoff would be at Steve Morgan's office (R. 199). At this point, the agents left and went to Mr. Morgan's office (R. 199). Mr. Morgan, who had returned to his office, testified that he was called by the Petitioner on the telephone and advised that he would receive a call from another party and was to do exactly what they told him to do (R. 136). He was later called by the Sheriff, who advised him that the transaction was going to take place in his (Morgan's) office and that they were coming back down there (R. 136-137).

At that point, Charlie McGlamry called and advised Morgan that he was to meet him at the "Beacon" and pick up the money (R. 137). As he was leaving his office to go after the money, the officers were arriving; and they stated to him that they were going to hide inside his building (R. 138).

Mr. Morgan went to the Beacon and received the money from Mr. McGlamry and returned to his cabinet shop where he conferred with the officers (R. 140).

At that point, Morgan called the Petitioner and advised him that he had the money; and the Petitioner wanted to know if he was "coming back here on the way home" (R. 140). Morgan advised that he would be by and that he would go ahead and split up the money (R. 140). The money was then marked by the officers and returned to Morgan (R. 140-141).

The officers then left Morgan's office and went to the "bonding office" where Morgan was supposed to meet the Petitioner (R. 142-143). It was understood that if Morgan came out of the bonding office by himself that the money had changed hands and the officers were to go "in and arrest Jack Humphrey" (R. 143).

Mr. Morgan went to the bonding office; and when he went inside, the Petitioner was sitting behind the desk with his feet up and Morgan pulled the money out of his pocket and laid it on the desk (R. 143). According to Morgan, the Petitioner picked up the money, put it in his pocket and sat back (R. 143). At this point, Morgan left the bonding company, went back to his car and as he was driving off, saw the deputies go into the bonding office (R. 144).

The Sheriff and his deputies were present near the bonding company when Mr. Morgan arrived (R. 322). Af-

ter Mr. Morgan arrived and had been inside for three or four minutes, he came out and drove off in his automobile (R. 323).

As Mr. Morgan was starting out of the parking lot, Officer Joiner, Captain Talton and Sgt. Snellgrove went through the front door of the bonding company.

Officer Joiner opened the front door and went inside, stating to Mr. Humphrey at that time that "he was under arrest, to stand up and put his hands on top of his head" (R. 324). Officer Joiner repeated to the Petitioner that he was under arrest and to stand up (R. 324).

While Officer Joiner was patting him down, he found a weapon in his back pocket which was not in plain view since it was covered by an overcoat and a suit coat (R. 324).

Sgt. Snellgrove, who was standing in the rear of the office, stated that he saw the money and was leaning over looking under the desk and pointing to it (R. 324-325). The money was up under the desk "on the floor against the wall" (R. 325).

At the point where Officer Joiner went into the bonding office, he did not know that the money had been transferred to the Petitioner (R. 326). Officer Joiner stated that his job was to go in the door first and arrest the man (R. 326).

According to Officer Joiner, Sgt. Snellgrove had to squat down and reach up under the desk to retrieve the money (R. 327).

As far as Officer Joiner could recall, there was no discussion about getting a Justice of the Peace and securing a warrant for the Petitioner's arrest based on the information which the officers had at that time, which

was basically to the effect that he had solicited a bribe (R. 328). Officer Joiner stated that he was instructed to arrest him inside the building (R. 328). These instructions came from the Sheriff (R. 328).

There was no way for the Petitioner to get out of the building since the officers had it surrounded (R. 328-329).

The testimony is clear that the officers did not see the Petitioner committing any crime in their presence (R. 234, 284, 315).

Once the G.B.I. agents had obtained the recording of the conversation between Morgan and the Petitioner, they determined that there was at that time probable cause for an arrest (R. 225-226). The proceedings after that point were to gather evidence to strengthen the case (R. 229).

Agent Wynn recalled some conversation about trying to locate a Justice of the Peace but "evidently he wasn't where we could probably get him there that quick" (R. 281). This conversation apparently took place about 8:00 or 8:30 p.m. on the night of the arrest (R. 282).

In this connection, Mr. Nick J. Lazaros testified that he was a Justice of the Peace for that area and that he lives about three-quarters of a mile from the Sheriff's office (R. 337-338).

Mr. Lazaros testified that he usually goes by the Sheriff's office at about 6:00 p.m. in the evening to see if "there is anyone looking for me" (R. 339). After that he usually goes out to eat "and being a bachelor I have no place to hang out, so I'm usually back up there at night" (R. 339). He testified that this was virtually a daily routine for him (R. 339).

Mr. Lazaros further testified that on the night the Petitioner was arrested, he had occasion to go by the Sheriff's office in Warner Robins (R. 339). He felt that it was somewhere around 9:30 or 10:00 p.m. (R. 340). As he was entering the building, he saw Mr. Joneal Lee, the District Attorney, sitting at a desk and talking on the telephone. Mr. Lee looked up at him and waved, and he walked on up the hall where he saw a G.B.I. agent named Jim Hooks, and then he went into the Commissioner's room. He stood around for about five minutes and there "didn't seem to be any atmosphere of friendliness so I said well, I'd better get out of here." He further testified that "I said something is up" (R. 340).

As Mr. Lazaros was leaving the building, he saw the Petitioner, Jack Humphrey, nearby talking to Agent Jim Hooks with the G.B.I. It should be noted that the bonding office where Mr. Humphrey was arrested is located immediately behind the Sheriff's office.

Finally, Mr. Lazaros testified that he waved to the District Attorney as he left and went home since nobody seemed to want to talk to him (R. 341). It takes about five minutes to get from the Sheriff's office to the apartment where Mr. Lazaros lives (R. 345).

Mr. Lazaros testified affirmatively that he was definitely available during the night in question to issue arrest warrants had he been needed (R. 346).

ARGUMENT IN SUPPORT OF REASONS FOR ALLOWANCE OF WRIT

I.

The Entry, Search and Seizure Which Took Place Inside the Petitioner's Place of Business Was in Violation of the United States Constitution, Amendments IV and XIV, in That the Officers Were Not in Possession of a Search Warrant and Since There Was No Valid Arrest of the Petitioner to Support an Incidental Search.

The Fourth Amendment to the United States Constitution is intended to preserve and protect the rights of all citizens to feel secure in the privacy of their own property. The requirement of a search warrant based upon probable cause is explained in *Johnson* v. *United States*, 333 U.S. 10, 13-14, as follows:

> "The point of the Fourth Amendment which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such

> crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

This principle has been held effective not only as to private dwellings, *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529, but also to places of business as indicated by the following from *See* v. *Seattle*, 387 U.S. 541, 543:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."

Whenever law enforcement officers seek to conduct a search such as the one in the present case, they must either obtain a search warrant based on probable cause, or effect a warrantless search based on probable cause and under exigent circumstances, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 460. As to the latter requirement, Petitioner contends that the search fails for the lack of exigent circumstances. The Petitioner was at this time a member of the City Council, a hard-working businessman, and a respected member of the community. There is no indication that he would have fled the county or the state on the night of the arrest or any other night thereafter. The officers involved could easily have acquired a search warrant without jeopardizing their case.

In the present case no facts appear which in any way tend to justify the entry of the Petitioner's business premises without a search warrant. In fact, affirmative

facts to the contrary appear. As set out in the statement of facts, supra, Justice of the Peace Lazaros was present and available to the officers at all times and was apparently ostracized or at least ignored so that any warrant procedure could be sidestepped and avoided.

A situation strikingly similar to this one is found in the case of *U. S.* v. *Scheffer*, 463 F.2d 567 (5th Cir. 1972). In that case several codefendants had been arrested on charges of illegally importing narcotic drugs into the United States. These defendants in turn gave the Customs officers information which led them to a house in California where the delivery of the drugs was to be made. The agents gave the co-defendants the package which was "marked" with fluorescent dust and watched while they entered the home of the defendant Scheffer. Shortly thereafter, the agents entered, arrested the occupants and seized certain incriminating items *which were in plain view* on a table in the living room.

On appeal, the search and seizure of the Scheffer home was held invalid because the agents had not secured a search warrant and the items seized were ordered suppressed. A few quotes from the opinion will illustrate the Court's thinking:

> "It is, of course, an elementary constitutional principle that police officers must go before a neutral government official and obtain a search warrant before intruding into a private dwelling. This requirement attaches even though the facts within the knowledge of the police officers would have authorized the issuance of a warrant." 463 F.2d at 574.
>
> "In the case at hand, we have carefully reviewed the record and there is simply no plausible explanation as to why Customs officials failed to go before

a magistrate and obtain a search warrant. The government does state in its brief that the circumstances surrounding the raid on the Scheffer house were such that there was not enough time to secure a search warrant. This statement seems incredible, however, in view of the fact that Customs agents, acting through the cooperating smugglers, actually planned the cocaine transfer and could have controlled the time at which it took place. Slight delay or the inconvenience of presenting facts to a magistrate are not sufficient circumstances to by-pass the warrant requirement." 463 F.2d at 567.

The *Scheffer* case is precisely in point on principle and is factually very close to our situation. It involved a "controlled delivery" the same as did our case. If anything, the present case is even more appropriate for an application of the *Scheffer* holding. While no effort was made to seek out a magistrate in *Scheffer*, in our case Justice of the Peace Lazaros was ignored and even led to believe that he was not welcome. Under these circumstances an even heavier duty rested upon the officers to comply with the search warrant procedures since they could have had Mr. Lazaros at their disposal and the building searched was right behind the Sheriff's office where he customarily "hung out." We submit that the entry of Petitioner's business under these circumstances should be condemned as an unlawful search and seizure and that the evidence and testimony gathered thereby should be ordered suppressed.

There are, of course, exceptions to the general rule that a warrant be issued by a magistrate in order for a search to be considered lawful. However, these instances are limited, as shown by this quotation from *Jones* v. *United States*, 375 U.S. 496, 499:

> "The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them."

The proposition is well recognized that a search may be made as an incident to a lawful arrest, even though the arrest and search are made without the authority of warrants, so long as there is probable cause to support the arrest. *Henry* v. *United States,* 361 U.S. 98, 102. Thus, probable cause for the arrest is always the key problem to be resolved where suppression of evidence from an incidental search is sought. While the degree of knowledge required is difficult to ascertain, it is certain that the standards be *at least* as strict as is necessary for the issuance of an arrest warrant, *Whiteley* v. *Warden, Wyoming State Penitentiary,* 401 U.S. 556, 566, but not so complete as to support a conviction, *Adams* v. *Williams,* 407 U.S. 147, 149.

The case of *Beck* v. *Ohio,* 397 U.S. 89, sets forth the principles involved in all cases of the type now before the Court. Though the present case differs factually from *Beck,* the following is nonetheless applicable:

> "There are limits to the permissible scope of a warrantless search incident to a lawful arrest, but we proceed on the premise that, if the arrest itself was lawful, those limits were not exceeded here. See Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399; United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; cf. Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777. The constitutional validity of the search in this case, then, must depend upon the constitutional validity of the petitioner's arrest. Whether that arrest was

> constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 1310-1311, 93 L.Ed. 1879; Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134. 'The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating * * * often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.' Brinegar v. United States, supra, 338 U.S. at 176, 69 S.Ct. at 1311." (*Beck*, P. 91)

Part of the test for determining probable cause appears to be the existence of some objective factor which indicates that a crime has been or is being committed by the suspect, e.g., by officers' sight, hearing, smell or other means of perceiving, *Beck* supra at page 94. This also is a probable cause test under the law of Georgia, §27-207 Ga. Code Ann.[1] In this connection an offense is committed "in the view or in the presence of an officer where any of his senses affords him knowledge that an offense is being committed." *Ramsey* v. *State*, 92 Ga. 53, 63, 17 S.E. 613;

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1. *27-207 (917 P.C.) Arrest without warrant*

"An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be failure of justice for want of an officer to issue a warrant."

see also *Howell* v. *State*, 162 Ga. 14(6c), 134 S.E. 59, *Phelps* v. *State*, 106 Ga. App. 132, 126 S.E.2d 429, and *Raif* v. *State*, 109 Ga. App. 354, 366, 136 S.E.2d 169. The officers never saw the Petitioner committing any crime in their presence (R. 234, 284, 315). Their senses of taste, smell, touch, sight and hearing could not operate under the present state of facts to enable the officers to *know* that an offense has been committed in their view or presence. The officers were concealed outside of the Petitioner's office with no means of observing or hearing what transpired therein. The only means available to them for determining whether a crime had been committed was the exit of Morgan, their informant, above. Regardless of any pre-arrangement of signals, the officers had no knowledge of their own that a crime had been committed nor any assurance from Morgan that one had occurred. Thus, based on a suspicion created by Morgan's exit alone, the officers entered Petitioner's office and effectuated an arrest and a search incidental thereto. It is well settled that "common rumor or report, suspicion, or even 'strong reason to suspect'" will not support an arrest warrant or serve as probable cause for a warrantless arrest under federal law, *Henry* v. *United States*, supra, at 101, or under Georgia law, *Nicholson* v. *United States*, 355 F.2d 80, 85, citing *Raif* v. *State*, 109 Ga. App. 354, 136 S.E.2d 169 (1964), and certainly §27-207 makes no exception in this regard.

An arrest which is not lawful at its inception cannot be made lawful simply because the arrest and subsequent search incident thereto turn up evidence sought by the officers. *United States* v. *Dire*, 332 U.S. 581, 595, states that "In law it is good or bad when it starts and does not change character from its success." "The fact that afterwards contraband was discovered is not enough." *Henry*, supra at page 103. The officers in the present

case cannot justify their warrantless arrest by the fact that marked money was found within Petitioner's office during a subsequent search. Since the arrest was unlawful, the subsequent discovery of marked money was then made pursuant to a warrantless search which is not subject to any of the exceptions.

In the last analysis, even assuming probable cause for an arrest and search without a warrant, the actions of these officers without warrants is a shocking violation of Petitioner's rights under the Fourth Amendment. The principle of *Johnson* v. *United States*, supra, has its strongest application where a judicial officer authorized to issue warrants is available. At page 14 of that case the Court said that the protection of the Fourth Amendment,

> ". . . consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant *would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.*" (emphasis added).

The investigation leading to this warrantless search and seizure covered a three-day period during which the officers obtained such evidence as would certainly have supported the issuance of a warrant. The delivery here, as in *Scheffer* supra, was controlled by the officers in that they could have delayed the delivery until a warrant was acquired. As fully set out in our statement of facts, supra, pps. 10-11, Justice of the Peace Lazaros was available to issue the warrants (authority of Justice of Peace to issue warrants: Ga. Code Ann., §§27-102, 303, 401) as

usual at the Sheriff's office where he customarily hangs out in the evenings. Not only was his assistance not requested, even though the District Attorney waved at him, but the atmosphere was so unfriendly that he felt compelled to leave the premises and go home. Even then he was only about five minutes away at his apartment (R. 345).

There have been numerous cases debating whether or not law enforcement officers should have taken time to go before a judicial officer empowered to issue warrants before arresting a person or carrying out a search. Such a debate has no place in the present case since such an officer was not only actually present and available but for some reason was either deliberately excluded or ignored during the entire proceedings leading up to the arrest in question. In the face of these facts, one State agent rather boldly testified that "evidently he wasn't where we could probably get him there that quick." (R. 281).

This is particularly important in the present case since the officers testified that they were in possession of facts earlier in the day which were sufficient to show a violation of the law but wanted to wait so that their case would be stronger (R. 225, 279). A basis for an arrest warrant had existed for several hours, yet a readily available Justice of the Peace had been ignored and made to feel unwanted. Under these circumstances, the State could have had Justice of the Peace Lazaros present and ready to issue the warrant as soon as Mr. Morgan left the Petitioner's place of business if they had so desired. A decision to the contrary was apparently made with the District Attorney and the legal advisor for the G.B.I. agents (Oliver Peters, R. 182) participating. We submit that with this many well-trained law enforcement officers and two lawyers on the scene, no excuse for not complying with Georgia's

warrant procedure should be accepted. The arrest was invalid and any search of the Petitioner or of his premises should be held unlawful and the evidence seized should be suppressed.

CONCLUSION

Accordingly, this petition for writ of certiorari should be granted and the judgment of the Supreme Court of Georgia should be reversed with directions that Petitioner's motion to suppress evidence be sustained.

Respectfully submitted,

BYRD, GROOVER & BUFORD

By: .....

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CERTIFICATE OF SERVICE

I, Floyd M. Buford, one of the attorneys for Jack Humphrey, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of June, 1974, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Georgia on the several parties thereto as follows:

On the State of Georgia by mailing three (3) copies in a duly addressed envelope with adequate postage thereon to the office of Joneal Lee, Esq., District Attorney of the Houston Judicial Circuit, at the Houston County Courthouse, Perry, Georgia 31069.

.....

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APPENDIX

APPENDIX "A"

In the Supreme Court of Georgia

Decided: March 8, 1974

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PER CURIAM. This case was transferred to this court from the Court of Appeals of Georgia because of a constitutional challenge to a Georgia statute. The appeal seeks review of several pre-trial rulings made in the Superior Court of Houston County following indictment by a grand jury in that county of the appellant for the offense of bribery. A second indictment also charges appellant, in one count, with the offense of carrying a concealed weapon; and in a second count, with the offense of carrying a pistol without a license. The appellant made two motions to suppress evidence, filed two pleas in abatement, numerous demurrers to the indictments and also made several written constitutional challenges to the Georgia Pre-Sentence Hearing Act, all of which were overruled by the trial court and are the subject of this appeal.

The trial court held an evidentiary hearing on appellant's motions to suppress evidence, and a transcript of the evidence at that hearing is included in the record filed in this court. The evidence adduced on the motions to suppress revealed the following: On January 9, 1973, two agents from the Georgia Department of Investigation were directed to report to the Mayor of Warner Robins, Georgia, to investigate alleged illicit activities involving a councilman of that municipality. The two agents arrived at the mayor's office on the morning of January 10, 1973, and immediately met with the mayor of the municipality

and Councilman Steve Morgan. At that meeting, Councilman Morgan described to the agents two encounters that had allegedly taken place with appellant who was also a councilman of the municipality, during which encounters the appellant had indicated his intention to solicit money from a developer, Charles McGlamry, in return for appellant's vote as a councilman to approve a water and sewer services expansion project of the municipality. The agents were told the developer had been approached for a "pay-off" by appellant through a Mr. Walter Whiting. Following this meeting, the D.O.I. Agents met with the developer and Mr. Whiting at approximately 3 P.M. on the afternoon of January 10, 1973, and confirmed appellant's solicitation through Mr. Whiting of a pay-off. The agents then met again with the mayor and Councilman Morgan and asked these two officials to pretend to go along with appellant in further dealings with him. Pursuant to this plan, Councilman Morgan called the appellant and set up a meeting with him at Councilman Morgan's office. This meeting occurred at approximately 7:30 P.M. on January 10, 1973. At that meeting, with Councilman Morgan's consent, D.O.I. Agents recorded a face-to-face conversation between Councilman Morgan and the appellant through the use of a tape recorder which had been placed secretly in Councilman Morgan's office. After the appellant left that meeting, the D.O.I. Agents listened to the tape of the conversation between Councilman Morgan and the appellant. The tape contains numerous statements tending to indicate appellant's involvement in a pay-off solicitation from the developer. It reflects that during the course of the conversation appellant discussed with Councilman Morgan a specific price for the pay-off in connection with the water and sewer project, which price Councilman Morgan was to convey to the contractor following the conversation. At approximately 8 o'clock that same evening, the D.O.I.

Agents contacted the Sheriff of Houston County to secure his cooperation and revealed to him the details of their investigation. Shortly thereafter, Councilman Morgan, in pursuance of the plan he and appellant had agreed upon, contacted the developer, Charles McGlamry, to set up the pay-off. The developer, who had also been made privy to the plan of the D.O.I. Agents, agreed to put up approximately $1600. Councilman Morgan revealed this to the law officers and told them the pay-off would be made at the developer's office. The agents and the sheriff, together with other officers, went to the developer's office, hid themselves, planted a tape recorder and awaited appellant's arrival. Appellant came to the developer's office but immediately asked him to go for a ride and the two men were gone for approximately a half-hour. Upon returning, the developer, Mr. McGlamry, informed the officers that no money had been transferred but that the pay-off would take place at Councilman Morgan's office. The officers then returned to Councilman Morgan's office. Subsequently, Councilman Morgan met with the developer, McGlamry, and received from him $1580. Thereafter, Councilman Morgan returned to his office and met with the law enforcement officers. The officers then marked the money and Councilman Morgan telephoned the appellant to tell him the money was in hand, and appellant instructed Councilman Morgan to bring half of it to his office. Councilman Morgan did this, and when he left appellant's office the law officers immediately entered the office and arrested the appellant for bribery. Upon the arrest of appellant, the officers found the marked money which was on the floor under appellant's desk at his office and also found a pistol concealed in the rear pocket of appellant's trousers.

No warrants of any kind were obtained in this case for the arrest of the appellant or for the seized recording

of the conversation between Councilman Morgan and appellant or for the seizure of the marked money and the pistol from appellant's possession at the time of his arrest. Testimony was also adduced, at the evidentiary hearing on the motions to suppress, showing that the situs of appellant's arrest was an office which he used located directly behind the sheriff's office and that a justice of the peace was present in the sheriff's office that same evening between 9:30 and 10:00 o'clock, P.M. The justice of the peace testified at the evidentiary hearing that his daily custom was to arrive at the sheriff's office at approximately 6 P.M. each day for his hearings, after which he usually ate supper and then on many days returned to the sheriff's office at night for conversation and company since he was a bachelor. The justice of the peace further testified that his home was only a five-minute drive from the sheriff's office.

I

Motion to Suppress Evidence Seized at the Time of Appellant's Arrest.

The basic question presented in appellant's first enumeration of error is whether the search of appellant in his office and the seizure of the alleged bribery money and pistol were legal. Under Georgia law (Ga. Code Ann. § 27-301) searches and seizures without warrants are authorized when made as an incident to a lawful arrest. The central point determinative of the search of appellant without a warrant is whether appellant's arrest by the officers was a legal arrest since it was made without a warrant. If the arrest were lawful, the search was lawful. If the arrest were illegal, the search was unlawful and the property seized as a result of it should have been suppressed as evidence by the trial court.

Georgia Code Ann. § 27-207 provides: "An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant."

As we have seen, Georgia law plainly restricts arrests without a warrant and the statute authorizes it to be done only in three instances. Thus, the question we face is whether the arrest in this case can logically fit into any of the three categories or exceptions authorized by the statute. This arrest was made after a city councilman, who was working with the law enforcement officers in accordance with a pre-arranged plan, had transferred the alleged bribe money to appellant. It is clear that the arresting officers were not dealing with a situation where the appellant was endeavoring to escape. He was arrested in his office which was surrounded by law enforcement officers and there was not even an attempt to escape made by the appellant. Additionally, it appears that the officers had reliable testimony available to them, on the afternoon of the very day on which the arrest was made that evening, and also had in their possession an incriminating recording of appellant's conversation with Councilman Morgan, that would authorize the issuance of a warrant for solicitation. A justice of the peace was, on that same night, available in the immediate vicinity; and, yet, no effort was made by the officers to secure a warrant although the arrest was not made until a later hour of that evening. Consequently, it does not appear that a magistrate was unavailable to issue a warrant or that the appellant was endeavoring to escape. The only possible category under which the arrest might be justified without a warrant is by that provision in the statute which

authorizes an officer to make an arrest, "if the offense is committed in his presence". "A crime is committed in the presence of an officer, if he sees it committed, or by the exercise of any of his senses he has knowledge, together with what he sees, that a crime is being committed by the person sought to be arrested." Howell v. State, 162 Ga. 14 (6c) (134 SE 59); Phelps v. State, 106 Ga. App. 132 (126 SE2d 429). See, also, Ramsey v. State, 92 Ga. 53 (1893); Porter v. State, 124 Ga. 297, 306 (52 SE 283) (1905); and, Davison v. State, 125 Ga. App. 502 (SE2d) (1972). The record before us discloses that the alleged acceptance of the bribe was within the immediate knowledge of the officers. The words, "in his presence", as used in Ga. Code Ann. § 27-207, and the words, "within his immediate knowledge", as used in § 27-211, authorizing arrest without a warrant by private persons, have been held to be synonymous. *Piedmont Hotel Company* v. *Henderson*, 9 Ga. App. 672 (72 SE 51). Therefore, we hold that the alleged offense was committed in the presence of these officers, justifying in this case their arrest of appellant without a warrant. It follows that the exclusionary rule of Ga. Code Ann. § 27-313 is not applicable to the evidence seized incident to this lawful arrest.

II

Pleas in Abatement.

Appellant argues next the trial court erred in overruling his pleas in abatement to the indictment charging him with bribery. As an elected councilman of the City of Warner Robins, appellant contends he was a "State official" within the meaning of Ga. Code Ann. § 40-1617 and entitled to be served with a copy of the proposed indictment, entitled to appear before the grand jury and

also entitled to have the Attorney General of Georgia notified of the proceedings. Under Ga. Code Ann. § 88-9907, "Any ordinary, member of any board of commissioners, county judge, or justice of the peace" shall be guilty of a misdemeanor for committing specified abuses of his office. Under Ga. Code Ann. § 88-9908, a proposed indictment, presentment or accusation under § 88-9907 must be served upon the accused and the accused shall have the right to make a statement before the grand jury. The rights provided to the county officials described in § 88-9908 are extended, under Code § 40-1617 to "any State official before an indictment . . . charging him with misfeasance or malfeasance in office shall be laid before a grand jury . . . and the Attorney General of Georgia shall be notified of such contemplated action . . ."

A reading of these statutes discloses that a councilman of a municipality in Georgia is simply not one of the officials covered by the statutes. Section 88-9908 covers county officials, whereas § 40-1617 relates only to "State officials". The appellant was neither a county official nor a State official, and the good argument made that the protection of these statutes should be extended to councilmen of municipalities is misdirected since we are duty bound to apply the plain provisions of the statutes as written and not to enlarge their protection by extending them to cover officials who are not described therein. Only the General Assembly of Georgia is authorized to extend the coverage of these statutes to city councilmen. For cases illustrative of the coverage of the statutes, see Fancher v. State, 113 Ga. App. 195 (147 SE2d 463), and Jones v. Mills, 216 Ga. 616 (118 SE2d 484).

III

Demurrers to the Bribery Indictment.

We have reviewed the appellant's demurrers to the bribery indictment which were overruled by the trial court. They complain variously of disjunctive allegations, variance between the language of the indictment and the statute, and specified vagueness in the provisions of the indictment. The bribery indictment reads as follows: "The Grand Jurors, . . . charge and accuse Jack Humphrey . . . with the offense of bribery for that the said accused, on the 10th day of January, 1973, in the State and County aforesaid, did then and there commit the offense of bribery in that the said accused, being an elected and active member of the City Council of the City of Warner Robins, Georgia, did, while acting as a city councilman for and on behalf of said political subdivision, solicit and receive from one Charles McGlamry a bribe, benefit, reward or consideration to which the said accused was not entitled, said bribe, benefit, reward or consideration having been received by said accused for the purpose of influencing him in the performance of his duties relating to the function of his office."

We believe the trial court properly overruled these demurrers. The indictment is basically couched in the terms of the statute and adequately puts the defendant on notice that he is accused of the crime of bribery. It alleges a particular date and person from whom the alleged bribe was received for the purpose of influencing appellant in the performance of his duties as a councilman of the City of Warner Robins. This meets the test of the law and is sufficient. See Henderson v. The State, 113 Ga. 1148 (SE) (1901); Wellborn v. The State, 78 Ga. App. 520 (SE2d) (1949); Saunders v. The State,

43 Ga. App. 59, 60-61 (SE) (1931); Dowda v. The State, 74 Ga. 12 (1884); and Sloan v. The State, 68 Ga. App. 92 (SE) (1942). No error is shown by the enumerations of error complaining the trial court overruled the demurrers to this indictment for bribery.

IV

Demurrers to the Misdemeanors Indictment.

Appellant asserts the two-count indictment, charging him with carrying a concealed weapon and carrying a pistol without a license, is subject to the demurrers interposed thereto in the trial court. Cosper v. The State, 13 Ga. App. 301 (79 SE 94) (1913) is relied upon to support appellant's contention that the present indictment is defective because it does not allege criminal intent in charging him with carrying a pistol without a license. The holding in *Cosper* is that a boy who found a pistol and carried it home for safe-keeping for its rightful owner did not have the intent to carry a pistol without a license. However, as pointed out in that case, the intent to carry a pistol without a license is inferred from the act itself, but this inference was there rebutted by the particular facts of that case. The present indictment charges this offense in the language of the statute and alleges it was committed "unlawfully", from which allegation the criminal intent is necessarily inferred. See York v. State, 42 Ga. App. 453, 461 (SE) (1930); and Shehany v. Lowry, 170 Ga. 70 (SE) (1929).

The second ground of demurrer challenged the indictment for failure to identify a particular pistol. This demurrer is without merit since it is not necessary to allege a specific type of pistol in order to put the defendant on notice of the elements of the offenses charged in this indictment. We find no error here.

V

Constitutional Challenges to Trial
Under Pre-Sentence Hearing Act.
(Ga. Code Ann. § 27-2534)

Appellant makes several constitutional challenges to the Georgia Pre-Sentence Hearing Act (Ga. L. 1970, p. 949, as amended by Ga. L. 1971, p. 902). Assuming appellant has standing to assert these challenges prior to trial, we find them to be without merit. This court has previously upheld the constitutionality of this law in McKenzie v. The State, 231 Ga. 513 (SE2d) (1973), and that decision dealt with substantially the same issues raised in this appeal. One additional attack made here that was not considered in the *McKenzie* case is appellant's contention that the body of the Act contains matter different from that expressed in the caption. Appellant argues the caption refers to "felonies not punishable by life" while the body of the Act deals with "all felonies". Our reading of the Act convinces us that the caption plainly does not indicate the Act deals only with "felonies not punishable by life imprisonment" but, on the contrary, the quoted phrase is used in reference to an Act that repealed an Act amended by this statute. See Ga. L. 1970, pp. 949, 950. There is no merit in this enumeration of error and the trial court correctly overruled appellant's objections thereto.

VI

Motion to Suppress the Recorded Conversation
Between Appellant and Councilman Morgan.

We deal finally with appellant's argument that the face-to-face conversation between appellant and Councilman Morgan, which was recorded with the latter's consent

but without the knowledge and consent of appellant, should have been suppressed as evidence by the trial court.

This recording must be scrutinized under the provisions of our Code applicable to such recordation. Pertinent parts of § 26-3001, read as follows:

> "It shall be unlawful for: (a) any person in a clandestine manner to intentionally overhear, transmit, or record, or attempt to overhear, transmit or record the private conversation of another which shall originate in any private place; (d) any person to intentionally and secretly intercept by the use of any device, instrument, or apparatus the contents of a message sent by telephone, telegraph, letter or by other means of private communication . . ."

Code § 26-3006 sets forth as exceptions to the above rules the following:

> "Nothing in § 26-3001 shall prohibit the interception, recording and divulging of a message sent by telephone, telegraph, letter or any other means of communication . . . in those instances wherein the message shall be initiated or instigated by a person and the message shall constitute the commission of a crime or is directly in the furtherance of a crime, provided at least one party thereto shall consent."

Appellant contends that the provisions of § 26-3006 do not include face-to-face conversations, and that the use of the words "or other means of communication" in this section indicate other means similar to the means of "telephone, telegraph, [or] letter." We do not interpret this section to require any distinction between face-to-face conversation and those communications which are transmitted less directly. A careful review of these pro-

visions of our law convinces us that face-to-face conversations were intended by the legislature to be included in the consent exceptions contained in § 26-3006. The conversation recorded here was "in furtherance of a crime" and, as it was done with the consent of one of the parties, it met the requirements of the statute authorizing it to be done in a private place and may be used as evidence upon proof of its authenticity. See the concurring opinion of Judge Evans in Cross v. State, 128 Ga. App. 837, 841, et seq. (SE2d) (1973).

Conclusion

We have determined from our study of the record and briefs in this case that appellant's enumerations of error are without merit.

Judgment affirmed. All the Justices concur, except Ingram, J., who dissents from Division I of the opinion and the judgment rendered therein.

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INGRAM, Justice, dissenting. I respectfully dissent to Division I of the court's opinion and to the judgment affirming the overruling of the motion to suppress the evidence seized at the time of appellant's arrest.

These officers certainly had good probable cause to conclude that a crime had been committed and that the appellant should be arrested. However, I do not read the record to authorize a conclusion that the crime was committed "in the presence" of the officers. They were given the signal by Councilman Morgan, as he came out of appellant's office, that informed them the alleged bribe money had been accepted by appellant. But the officers

did not see or hear the commission of the crime and they were not present in appellant's office when he alledgedly accepted the bribe money.

The facts of this case do not bring it within any of the three exceptions for which the statute authorizes an arrest without a warrant. Therefore, I must stand with Chief Justice Bleckley's position in Thomas v. State, 91 Ga. 204, 206 (3) (SE) (1892) that: "No one who properly appreciates the sacredness of personal liberty, and the jealousy of the law in guarding, the same, can doubt that as a general rule the law requires a warrant in order to render an arrest legal, whether it be made by a policeman or any public officer. Only three exceptions to this rule are recognized by the Code. See Section 4723. The first is, where an offense is committed in the officer's presence; the second, where the offender is endeavoring to escape; and the third, where from other cause there is likely to be a failure of justice for want of an officer to issue a warrant. Where an arrest for a past offense is intended, and there is no present emergency, no want of time or opportunity for obtaining a warrant, why should a policeman be allowed to dispense with a warrant when other officers of the law could not? Any information as to the commission of an offense which would serve as a reasonable basis for making an arrest, would serve for suing out a warrant."

For additional authority, see Vlass v. McCrary, et al., 60 Ga. App. 744 (5 SE2d 63) (1939); and, Ronemous v. State, 87 Ga. App. 588, 591 (3) (74 SE2d 676) (1953).

Since the appellant's arrest without a warrant was unlawful, it follows that the evidence seized incident to that arrest must be suppressed.

APPENDIX "B"

SUPREME COURT OF GEORGIA

Atlanta, March 21, 1974

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Jack Humphrey v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied. Ingram, J., dissents. Hall, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

APPENDIX "C"

SUPREME COURT OF GEORGIA

Atlanta, March 21, 1974

The Honorable Supreme Court met pursuant to adjournment.

By Chief Justice Grice:

The following direction was given:

Jack Humphrey v. The State

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on March 21, 1974, such motion is hereby granted, subject to the following conditions:

The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment, and until the final disposition of the said case by that court; Provided, that promptly upon the filing of such appeal or application in the Supreme Court of the United States, the clerk of this court shall be notified thereof in writing and also shall be notified of any judgment of that court denying such application or appeal and of any motion for rehearing, or, if no application or appeal be filed in that court within the said ninety day period or within an authorized extension thereof, the clerk of this court shall be promptly so notified in writing.

/s/ Benning M. Grice
Chief Justice

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA,

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.